UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES L. KIMBALL,	)	
	)	
Plaintiff	)	
	)	
v.	)	*Civil No. 91-313-P-C*
	)	
LOUIS SULLIVAN,	)	
Secretary, Department of	)	
Health & Human Services,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION [1]

This Step One Social Security Disability appeal presents the question whether substantial evidence supports the Secretary's finding that the plaintiff is engaged in substantial gainful activity.[2] The plaintiff contends that, although he is self-employed, his part-time work-related efforts are insufficient to constitute substantial gainful activity.

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[1] This action is properly brought under 42 U.S.C. ' 405(g). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 12, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 29, 1992 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

[2] Substantial gainful activity means work that involves significant and productive physical or mental duties and is that done for pay or profit. 20 C.F.R. ' 404.1510.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff met disability insured status requirements as of October 30, 1985 and continued to meet them at least through December 31, 1993, Finding 1, Record p. 22; that he is ``working as a self-employed contractor, and has been since 1986, and his work efforts are worth at least $300 per month during the years prior to 1990, and $500 per month in years after 1989, when considered in terms of their value to the business or when compared to the salary that an owner would pay to an employee doing the same type of work," Finding 2, Record p. 22; that his work activity involves significant physical or mental activities for pay or profit, Finding 3, Record p. 22; and that his activity constitutes substantial gainful activity within the meaning of the regulations, with the result that he was not under a ``disability" as defined in the Social Security Act at any time through the date of decision, Findings 4, 6, Record p. 22. The Appeals Council declined to review the decision,[3]

[3] In doing so, the Appeals Council specifically considered contentions raised by the plaintiff in a memorandum dated February 5, 1991, as well as an accompanying *Newsweek* magazine article dated November 12, 1990 which discusses chronic fatigue syndrome, but found no basis for changing the Administrative Law Judge's decision. Record p. 4; *see id.* pp. 13-17. In the memorandum the plaintiff offered to resolve inconsistencies in his asserted work history and stated that his current activities are ``therapeutic rather than economic;" he also asserted that his federal income tax forms fully reflected the income generated by the activities at issue, that the Administrative Law Judge requested the court reporter to stop recording while he asked the plaintiff questions about his religious activities and that the Administrative Law Judge refused to permit the plaintiff's only witness, his mother, to testify at the hearing. *Id.* pp. 13-14.

Record pp. 4-5, making it the final determination of the Secretary. 20 C.F.R. ' 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. ' 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff has stated that since the summer of 1986 he has been employed performing construction and general repair work and installing furnaces and that since September 1988 he has earned $12.50 per hour. Record p. 85. He further stated that he works at his own pace, gets jobs from his family and makes about three thousand dollars per year. *Id.* pp. 33-35. His federal income tax returns indicate the following about his work during the years 1987-1989:

Year	Gross Receipts	Cost/Goods	Gross Income	Expenses	Net Profit
1987	$ 9,276	$5,182	$4,094	$1,184	$2,910
1988	$11,013	$5,342	$5,671	$3,017	$2,654
1989	$10,264	$8,176	$2,088	$4,426	($2,338)

Id. pp. 280, 292, 304 (figures are rounded to the nearest dollar).

The Administrative Law Judge concluded that the plaintiff's work efforts were worth at least $300 per month during the years prior to 1990 and $500 per month in the years after 1989, when considered in terms of their value to the business or when compared to the salary that an owner would pay to an employee doing the same type of work. Finding 2, Record p. 22. He appears to have arrived at this conclusion on the basis of certain information contained in the plaintiff's tax returns, namely Kimball's gross receipts for each year, his asserted car and truck expense deductions of

$1,121.40 (1987), $859.25 (1988) and $2,991.15 (1989) and his claimed depreciation on a business vehicle for 1988 and 1989. Record p. 21. The Administrative Law Judge offered no explanation as to why or how these statistics reflect the value of the plaintiff's activity to a business owner or to the plaintiff's own business. He did state that ``the Administrative Law Judge cannot conclude that Mr. Kimball received a substantial income" based on Kimball's net profits for each year. *Id.*

A claimant is presumed to engage in substantial gainful activity if his earnings exceed $300 per month for any year prior to 1990 and $500 per month for any year subsequent to 1989. 20 C.F.R. ' 404.1574(b)(2)(vi), (vii); *Keyes v. Sullivan*, 894 F.2d 1053, 1056 (9th Cir. 1990) (citations omitted). A self-employed individual is also found to engage in substantial gainful activity if, among other things:

> (1) [His] work activity, in terms of factors such as hours, skills, energy output, efficiency, duties, and responsibilities, is comparable to that of unimpaired individuals in [his] community who are in the same or similar businesses as their means of livelihood;
>
> (2) [His] work activity, although not comparable to that of unimpaired individuals, is clearly worth the amount shown in ' 404.1574(b)(2) when considered in terms of its value to the business, or when compared to the salary that an owner would pay to an employee to do the work [he is] doing; or
>
> (3) [He] render[s] services that are significant to the operation of the business and receive[s] a substantial income from the business.

20 C.F.R. ' 404.1575(a). Substantial income is determined, in part, by subtracting normal business expenses from gross receipts. *Id.* ' 404.1575(c); Social Security Ruling 83-34, reprinted in *West's Social Security Reporting Service* at 157 (Supp. 1991). Social Security Ruling 83-34 explains one of the purposes underlying the three tests: ``An individual's services may help build up capital assets during a period of development when no profits are evident . . . . Hence, it is necessary to consider the economic value of the individual's services, regardless of whether an immediate income results from such services." Social Security Ruling 83-34, at 153. In order to provide a sound basis for determining economic value, the Secretary must develop a detailed record:

> Development must be specific. Each work factor . . . must be described in detail, showing its contribution to the business operation. General descriptions are considered inconclusive . . . [and] any doubt as to the comparability of the factors should be resolved in favor of the impaired individual.
>
> Evidence of the impaired individual's activities accompanied by a statement that the work is comparable to the work of unimpaired persons is insufficient for a sound decision. . . .
>
> With respect to tests two and three, the degree to which evidence of comparability or worth of services should contain data supplied by outside authorities (e.g., county agents, etc.) will depend on the factual situation. . . . [W]here there is any doubt as to the comparability or worth of services, it will be necessary to obtain evidence in appropriate detail, supplemented as required by opinions from authoritative sources in the community.

Id. at 163-64.

The Administrative Law Judge failed to explain how he determined the value of the plaintiff's activity, although his finding makes clear that he applied the second test. He simply reached a bare conclusion that Kimball's gross receipts reflect the value of his activity, with no further evaluation of the comparable worth of the plaintiff's activity to other businesses or to Kimball's own business. There is a dearth of evidence in the record to support such a finding. At oral argument the Secretary contended that the cost of the goods purchased by the plaintiff supported the Administrative Law Judge's conclusion. However, there is no rational basis for believing that the cost of goods purchased by Kimball to satisfy his customers indicates the value of his services. Nor do his other deducted expenses provide a basis for valuing his work. Kimball asserted at oral argument that, except for depreciation on his vehicle, his truck and car expenses were cash outlays -- which do not appear to constitute capital investments in his business.

The only evidence in the record upon which a valuation might be made is the plaintiff's own general statements and his federal tax filings. Social Security Ruling 83-34 requires more specific articulation of the plaintiff's contribution than the general statements provided by him in this record. Furthermore, where the value of a claimant's activity is uncertain, which it surely is in this case, the

Administrative Law Judge is directed to look to authoritative sources in the community. He relied on none and no such sources are found in the record. Instead, it appears that he relied on the plaintiff's gross receipts as the deciding factor. This application of the second test appears to be simply a stripped-down version of the third test which requires the Secretary to consider net profits calculated by deducting normal expenses, such as the plaintiff's truck and car expenses. Such a lax reading of the requirements for satisfying the second test under Social Security Ruling 83-34 would obviate the need for ever applying the more stringent third test. Thus, there is insufficient support for the Secretary's application of the second test, or for that matter the first test which requires a comparison with the work of unimpaired individuals in the plaintiff's community. The Administrative Law Judge did apply the third test, contrary to the Secretary's contention at oral argument, and, as mentioned above, concluded in his opinion that the plaintiff's annual net income was insufficient to show that his activity produced substantial income. In sum, I find that the Secretary's conclusion as to the worth of the plaintiff's activity is not supported by substantial evidence.

For the foregoing reasons, I recommend that the Secretary's decision be ***VACATED*** and the cause ***REMANDED*** for further proceedings consistent with this opinion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 11th day of June, 1992.

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David M. Cohen
United States Magistrate Judge